Supreme Court, U.S.
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No. 95-371

In the Supreme Court of the United States

OCTOBER TERM, 1995

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
ALBERT M. FERLO, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

20pp

QUESTION PRESENTED

Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, applies to a federal agency's determination of the critical habitat for a threatened or endangered species under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alabama ex rel. Siegelman v. *EPA*, 911 F.2d 499 (11th Cir. 1990)	13
Anchorage v. *United States*, 980 F.2d 1320 (9th Cir. 1992)	13
Andrus v. *Sierra Club*, 442 U.S. 347 (1979)	13
Calvert Cliffs' Coordinating Committee, Inc. v. *United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971)	12
Concerned About Trident v. *Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977)	11, 12
Davis v. *Morton*, 469 F.2d 593 (10th Cir. 1972)	12
Environmental Defense Fund v. *Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972)	12
Flint Ridge Development Co. v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976)	9, 10
Jones v. *Gordon*, 792 F.2d 821 (9th Cir. 1986)	12
Limerick Ecology Action, Inc. v. *NRC*, 869 F.2d 719 (3d Cir. 1989)	12, 13
Louisiana v. *Federal Power Comm'n*, 503 F.2d 844 (5th Cir. 1974)	12
Merrell v. *Thomas*, 807 F.2d 776 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987)	11
Metropolitan Edison Co. v. *People Against Nuclear Energy*, 460 U.S. 766 (1983)	13, 14
Northern Spotted Owl v. *Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988)	4

Cases—Continued: Page

Northern Spotted Owl v. *Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) 5
Pacific Legal Foundation v. *Andrus*, 657 F.2d 829 (6th Cir. 1981) 5
Public Service Co. v. *NRC*, 582 F.2d 77 (1st Cir.), cert. denied, 439 U.S. 1046 (1978) 12
Texas Committee on Natural Resources v. *Bergland*, 573 F.2d 201 (5th Cir.), cert. denied, 439 U.S. 966 (1978) 12, 13
Weinberger v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981) 4
Weyerhaeuser Co. v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978) 13
Wyoming v. *Hathaway*, 525 F.2d 66 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976) 13

Statutes:

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 2, 6, 7, 8, 9, 10, 11, 12, 14
§ 3(5), 16 U.S.C. 1532(5)(A)(i) 2
§ 3(15), 16 U.S.C. 1532(15) 2
§ 4, 16 U.S.C. 1533 ..... 5, 8, 9
§ 4(a)(3), 16 U.S.C. 1533(a)(3) 2
§ 4(b)(2), 16 U.S.C. 1533(b)(2) 3, 8
§ 4(b)(5), 16 U.S.C. 1533(b)(5) 3
§ 4(b)(5)(A)(ii), 16 U.S.C. 153 (A)(ii) 14
§ 4(b)(5)(E), 16 U.S.C. 1533(b)(5)(E) 14
§ 4(b)(6)(C)(ii), 16 U.S.C. 1533(b)(6)(C) (ii) 3
§11(g), 16 U.S.C. 1540(g) 14
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ..... *passim*
§ 102, 42 U.S.C. 4322 9
§ 102(C), 42 U.S.C. 4332(C) 3, 12

Miscellaneous: Page

48 Fed. Reg. (1983):
p. 49,244 5
pp. 49,244-49,245 5
55 Fed. Reg. 26,114 (1990) 4
56 Fed. Reg. (1991):
p. 20,816 5
p. 20,820 5
p. 20,824 5
p. 40,002 5-6
p. 40,011 6
p. 40,020 5
pp. 40,020-40,033 6
p. 40,034 6
57 Fed. Reg. (1992):
p. 1,796 6
pp. 1,803-1,806 6
pp. 1,810-1,811 6
pp. 1,814-1,821 6
pp. 1,826-1,828 6
p. 1,828 6
pp. 1,828-1,833 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 48 F.3d 1495. The opinion of the district court (Pet. App. 29a-58a) is reported at 810 F. Supp. 1470.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenged the decision of the Secretary of the Interior—acting through the Fish and Wildlife Service (FWS) and pursuant to the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*—to designate approximately 6.8 million acres of federal land as critical habitat for the northern spotted owl, which the Secretary had previously determined was a threatened species for purposes of the ESA. The district court set aside the designation, holding that, in designating the owl's critical habitat, the FWS was required to, but did not, comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. 42a-56a. The court of appeals reversed, holding that NEPA's requirements do not apply to designations of critical habitat under the ESA. *Id.* at 13a-27a.

1. a. Under Section 4 of the ESA, when the Secretary[1] lists a species as threatened or endangered, he generally must, at the same time, designate the species' critical habitat. ESA § 4(a)(3), 16 U.S.C. 1533(a)(3).[2] If the critical habitat is not "determinable" at the time of listing, however, the Secretary

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[1] The term "Secretary" means the Secretary of the Interior or the Secretary of Commerce, depending upon the wildlife species involved. ESA § 3(15), 16 U.S.C. 1532(15). Hereinafter, we use the term to refer to the Secretary of the Interior, as he was responsible for the species at issue here.

[2] The ESA defines critical habitat in part as "specific areas * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i).

may take up to an additional year to make the designation. 16 U.S.C. 1533(b)(6)(C)(ii).

The ESA provides that, in determining critical habitat, the Secretary must rely on the "best scientific data available" and take into "consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The ESA further requires the Secretary to designate an area as critical habitat if he "determines * * * that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2).

The ESA also places detailed procedural obligations on the Secretary when designating critical habitat. He must publish notice of the proposed designation in the *Federal Register*; give actual notice of the proposal to, and invite comments from, each State and county in which the species is believed to occur; publish a summary of the proposal in local newspapers; and hold a public hearing on the proposal if anyone requests one. 16 U.S.C. 1533(b)(5).

b. Section 102(C) of NEPA, 42 U.S.C. 4332(C), requires all federal agencies to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Preparation of an environmental impact statement (EIS) serves two purposes:

> The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process.

Weinberger v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981).

2. a. The Secretary decided to list the northern spotted owl as a threatened species in connection with litigation in the Western District of Washington. *Northern Spotted Owl* v. *Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988). When the Secretary announced his listing decision, he also announced that the critical habitat was not "determinable" on the basis of the information then available. 55 Fed. Reg. 26,114 (1990). In response to the latter announcement, the plaintiffs in *Northern Spotted Owl* v. *Hodel*, *supra*, obtained an order requiring the Secretary to publish a proposed critical habitat designation by April 29, 1991, and to issue the final designation at the "earliest possible

time under the appropriate circumstances." *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 629-630 (W.D. Wash. 1991).

On May 6, 1991, the Secretary published a proposed regulation defining critical habitat for the northern spotted owl. 56 Fed. Reg. 20,816 (1991). He identified approximately 11.6 million acres of federal, state, and private lands as "proposed critical habitat." *Id.* at 20,820. The Secretary invited comments on the proposal and stated that he would revise it in light of those comments. *Id.* at 20,816.[3]

In the May 6, 1991, notice, the Secretary determined that it was not necessary to prepare an environmental assessment. 56 Fed. Reg. 20,824 (1991). He relied on a policy, first announced by the FWS in 1983, that determinations under Section 4 of the ESA are not subject to NEPA. In adopting that policy, the FWS had "accepted [the Council on Environmental Quality's] judgment that Section 4 listing actions are exempt from NEPA review 'as a matter of law.'" 48 Fed. Reg. 49,244 (1983). The FWS policy had also been based on the fact that all 130 environmental analyses prepared between 1973 and 1983 resulted in a decision not to prepare an EIS, and that the Sixth Circuit had held in *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829 (1981), that listing decisions under Section 4 of the ESA are not subject to NEPA. 48 Fed. Reg. 49,244-49,245 (1983).

b. On August 13, 1991, the Secretary published a revised proposed designation of critical habitat. 56

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[3] Subsequently, the Secretary held four public hearings and received approximately 16,400 written comments on the initial proposed critical habitat designation. 56 Fed. Reg. 40,020 (1991).

Fed. Reg. 40,002 (1991). The revised designation reduced the proposed critical habitat area to about 8.2 million acres by eliminating all privately owned land and most state-owned land. *Id.* at 40,011. The Secretary included in the revised proposal a summary of the comments and recommendations on the initial proposal. *Id.* at 40,020-40,033. The revised proposal again invited comments and announced that no environmental assessment would be prepared. 56 Fed. Reg. 40,034 (1991).[4]

c. On January 15, 1992, the Secretary issued his final designation of critical habitat. 57 Fed. Reg. 1,796 (1992). The Secretary reduced the area designated as critical habitat to less than 6.9 million acres of land, all of which was federal land. *Id.* at 1,810-1,811. The Secretary also provided an extensive explanation of the analysis underlying the designation. The explanation included discussions of the criteria for identifying critical habitat and the application of those criteria in this case (*id.* at 1,803-1,806); the possible economic impacts of the designation (*id.* at 1,814-1,821); and the effect of the designation on biodiversity and ecosystem protection (*id.* at 1826-1828). The final designation also responded in detail to the public comments. *Id.* at 1,828-1,833.

3. Petitioner brought this action to challenge the Secretary's designation of critical habitat for the northern spotted owl. Petitioner contended that, in preparing the designation, the FWS had failed to comply with NEPA and violated the ESA. On cross-

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[4] The revised proposal provided a 60-day public comment period, during which four more public hearings were held and about 15,800 additional written comments were received. 57 Fed. Reg. 1,828 (1992).

motions for summary judgment, the district court held that petitioner had standing to bring a NEPA challenge; that the FWS had not violated the ESA; and that the FWS was required to comply with NEPA and had failed to do so. Pet. App. 29a-58a.[5]

In rejecting petitioner's ESA claims, the district court held that the FWS "took a 'hard look'" at the "relevant economic issues associated with critical habitat designation" and sufficiently discussed those issues in its decision. Pet. App. 36a. The court also held that the FWS "consider[ed] whether the proposed designation of critical habitat would impact other species such as deer and elk and stated a rational basis for its conclusion that the critical habitat designation would not negatively impact those species." *Id.* at 35a.

In holding that NEPA applied to the designation of critical habitat, the district court rejected the Secretary's reliance on *Pacific Legal Foundation.* Pet. App. 45a-55a. The court believed that that case was distinguishable on the ground that it involved the Secretary's decision to list a species as threatened or endangered, rather than his decision to designate the species' critical habitat.

4. The court of appeals reversed in relevant part, holding that "Congress intended that the ESA procedures for designating a critical habitat replace

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[5] Having ruled for the government on the merits of petitioner's ESA claims, the district court found that it was "not necessary to address [the government's] argument that [petitioner] lack[ed] standing to pursue" those claims. Pet. App. 36a n.2.

the NEPA requirements." Pet. App. 16a.[6] The court determined that the "carefully crafted congressional mandate for public participation in the designation process * * * displaces NEPA's procedural and informational requirements." *Id.* at 17a. It also observed that "the ESA has an important mandate that distinguishes it from NEPA." *Id.* at 18a. The court explained that the ESA mandates the designation as critical habitat of "any area without which the species would become extinct." *Ibid.* (citing 16 U.S.C. 1533(b)(2)). In the court's view, "[t]his mandate conflicts with the requirements of NEPA because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions." Pet. App. 18a.

The court of appeals also discussed two rationales offered by intervenors. The court stated, first, that NEPA procedures do not apply to federal actions that "[p]reserve the [p]hysical [e]nvironment." Pet. App. 21a. Second, the court stated that "NEPA does not apply to the designation of a critical habitat because the ESA furthers the goals of NEPA without demanding an EIS." *Id.* at 25a.[7]

ARGUMENT

As the Ninth Circuit observed, the question whether NEPA applies to the designation of critical habitat under Section 4 of the ESA is one "of first

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[6] While reversing on the merits, the court of appeals affirmed the district court's determination that petitioner had standing to assert its NEPA claim. Pet. App. 8a-13a.

[7] The Secretary did not endorse those positions in the court of appeals, although the Secretary did argue below, as we do in this Court (see pages 11-14, *infra*), that actions that have no effect on the physical environment are not covered by NEPA.

impression." Pet. App. 13a. The Ninth Circuit's resolution of that question turned upon the specific provisions of the ESA governing critical habitat designations. See *id.* at 15a-27a. Contrary to petitioner's contention (Pet. 7-13), the Ninth Circuit's decision regarding the interaction of NEPA and Section 4 of the ESA is correct and does not conflict with *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), or decisions in other circuits, all of which concern the interaction of NEPA and a statute other than the ESA. Further review is therefore unwarranted.

In *Flint Ridge*, the Court addressed "whether [NEPA] require[d] the Department of Housing and Urban Development (HUD) to prepare an [EIS] before it [might] allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act (Disclosure Act) to become effective." 426 U.S. at 778. HUD argued that an EIS was not required for two reasons: (1) HUD's allowing a disclosure statement to become effective was not a "major federal action significantly affecting the quality of the human environment within the meaning of NEPA"; and (2) even if it was, "HUD [was] nonetheless exempt from the duty of preparing an [EIS] because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record [required as part of the disclosure statement] become effective within 30 days of filing, unless incomplete or inaccurate on their face." *Id.* at 786-787. The Court agreed with the second argument (and therefore found it unnecessary to address the first argument). *Id.* at 787. The Court determined that Section 102 of NEPA "recognizes

* * * that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Flint Ridge*, 426 U.S. at 788. The Court discerned such a conflict between NEPA's EIS requirement and the Disclosure Act's 30-day effective-date requirement. The Court found it "inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments." *Id.* at 788-789. The Court rejected the argument that HUD could suspend the 30-day period pending the preparation of an EIS, "find[ing], to the contrary, that the Disclosure Act leaves the Secretary [of HUD] no such discretion." *Id.* at 789-790.

Relying upon *Flint Ridge*, the Ninth Circuit recognized in this case that NEPA's requirement that agencies comply with its terms "to the fullest extent possible" was "neither accidental nor hyperbolic." Pet. App. 14a (quoting *Flint Ridge*, 426 U.S. at 787). In keeping with this Court's analysis in *Flint Ridge*, the Ninth Circuit identified a "conflict" between NEPA's requirement that an EIS be prepared and the requirement of the ESA with regard to critical habitat designation. Specifically, the court of appeals held that the ESA requirement that the Secretary include as part of the designated critical habitat area, any "area without which the species would become extinct[,] * * * conflicts with the requirements of NEPA[,] because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions." Pet. App. 18a. Petitioner does not challenge that understanding of the limits on the Secretary's discretion under the ESA. The court's analysis thus fully comports with that of *Flint Ridge*.

There is likewise no merit to petitioner's assertion (Pet. 12-13) that "[i]n the Ninth Circuit federal agencies are now free to assert NEPA exemptions in the absence of any irreconcilable conflict" with respect to "thousands of agency decisions" under statutes other than the ESA. The legal theory upon which the Secretary relied in the court of appeals, and upon which the Ninth Circuit based its decision in this case, has been extant since 1986, when the Ninth Circuit issued its decision in *Merrell* v. *Thomas*, 807 F.2d 776 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Since *Merrell*, until the decision in this case, the court of appeals has not found *Merrell* applicable to any other statutory scheme. The court of appeals decision here, as in *Merrell*, turns on the analysis of a particular statute and its legislative history. It offers no incentive to other agencies implementing different statutory schemes to seek to avoid compliance with NEPA. There is simply no basis, therefore, to claim that "thousands of agency decisions may now be vulnerable to NEPA avoidance."

For similar reasons, the decision below does not conflict with the decisions of other courts of appeals cited by petitioner (Pet. 9-11). Petitioner contends that those decisions required agencies to identify a "statutory conflict" in order to exempt certain agency actions from NEPA. Pet. 10. The Ninth Circuit found such a conflict in this case. Pet. App. 18a.

The court of appeals decisions cited by petitioner are also distinguishable because they concerned federal actions that had a direct and immediate impact on the physical environment. For example, *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), involved the construction of nuclear power

plants. *Id.* at 1111-1112, 1115. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972), concerned the construction of a hydro-electric dam. *Id.* at 1169, 1176 (dictum).[8] There was accordingly no dispute in those cases as to the existence of a "[f]ederal action[] significantly affecting the quality of the human environment" within the meaning of NEPA, 42 U.S.C. 4332(C).

In contrast, the federal action at issue here did not have any direct and immediate impact on the physical environment. The only result of a designation of critical habitat is that federal agencies must consult with the FWS before starting a project in the critical habitat area.[9] The Ninth Circuit based its decision in part on the fact that the designation of critical habitat does not affect, but instead "[p]reserve[s] the [p]hysi-

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[8] See also *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719, 729-731 (3d Cir. 1989) (grant of full power license for nuclear power plant); *Jones* v. *Gordon*, 792 F.2d 821, 823, 825-827 (9th Cir. 1986) (grant of incidental take permit under MMPA); *Public Service Co.* v. *NRC*, 582 F.2d 77, 81-86 (1st Cir.) (rerouting of high-capacity electric transmission lines), cert. denied, 439 U.S. 1046 (1978); *Texas Committee on Natural Resources* v. *Bergland*, 573 F.2d 201, 206-208 (5th Cir.) (timber harvesting on national forests lands), cert. denied, 439 U.S. 966 (1978); *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 820, 823 (D.C. Cir. 1977) (location of submarine base); *Louisiana* v. *Federal Power Comm'n*, 503 F.2d 844, 849, 874-875 (5th Cir. 1974) (plan to curtail natural gas deliveries); *Davis* v. *Morton*, 469 F.2d 593, 594, 598 (10th Cir. 1972) (federal approval of 99-year lease on Indian land).

[9] Of course, the agency that proposes the project must comply with NEPA and the ESA. For example, if the Bureau of Reclamation proposes to construct flood control facilities in an area designated as critical habitat, the Bureau's flood control project would be subject to NEPA, as well as to the ESA.

cal [e]nvironment." Pet. App. 21a. Because that fact was not present in the cases upon which petitioner relies, the conclusion in those cases that NEPA's requirements were applicable does not conflict with the Ninth Circuit's conclusion that NEPA's requirements were not applicable here.[10]

The Ninth Circuit's reliance on the lack of an effect on the physical environment is consistent with *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983). There, this Court held that NEPA did not require the Nuclear Regulatory Commission, in deciding whether to permit a nuclear power plant to resume operations, to consider the asserted psychological harms that a resumption of operations would have upon people who lived near the power plant. *Id.* at 772-779. In so holding, the Court emphasized NEPA's concern with impacts on the

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[10] Petitioner asserts (Pet. 12) that an exemption from NEPA can be found only if there is an irreconcilable statutory conflict, as in *Flint Ridge*. That assertion fails to recognize that not all federal actions are subject to NEPA in the first place. For example, in *Andrus* v. *Sierra Club*, 442 U.S. 347, 356-364 (1979), this Court held that NEPA did not apply to agency requests for appropriations without finding a clear and irreconcilable conflict. Moreover, lower courts have held that NEPA does not apply when the underlying agency process is the functional equivalent of the NEPA process. See, *e.g.*, *Anchorage* v. *United States*, 980 F.2d 1320, 1329 (9th Cir. 1992); *Alabama ex rel. Siegelman* v. *EPA*, 911 F.2d 499, 504 (11th Cir. 1990); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1051 (D.C. Cir. 1978); *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-73 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976). Two of the decisions on which petitioner relies have recognized that an agency action may be exempt from the NEPA under the "functional equivalence" theory even in the absence of an irreconcilable statutory conflict. See *Limerick Ecology Action*, 869 F.2d at 729 n.7; *Texas Committee*, 573 F.2d at 207-208.

physical environment. The Court stated that the determination whether NEPA requires "consideration of a particular effect" depends upon "the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Id.* at 773. The Court found no such relationship in the case before it, because the asserted psychological harms were said to flow from residents' fear of a nuclear accident, and the "risk of an accident is not an effect on the physical environment" requiring analysis under NEPA. *Id.* at 775 (emphasis omitted).

Finally, petitioner errs in suggesting (Pet. 16-17) that NEPA provides the only vehicle for raising environmental concerns or presenting alternative configurations of critical habitat. Petitioner had an opportunity to do both under the procedures prescribed by the ESA. Thus, the ESA requires the Secretary to "give actual notice" of any proposed critical habitat designation "to each county * * * in which the species is believed to occur, and invite the comment of * * * each such jurisdiction." 16 U.S.C. 1533(b)(5)(A)(ii). A county may also request a public hearing. 16 U.S.C. 1533(b)(5)(E). If a county disagrees with the Secretary's final decision on the designation, it may seek judicial review of that decision under the ESA. 16 U.S.C. 1540(g). Petitioner sought such review by this action, and its ESA claims were considered by the district court (and rejected in rulings that are not at issue in this Court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ROBERT L. KLARQUIST
ALBERT M. FERLO, JR.
Attorneys

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